

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Mitchell David Holbach,)	
)	
Petitioner,)	
)	Case No. 3:09-cv-20
-vs-)	
)	ORDER ADOPTING REPORT AND
State of North Dakota, Don Redman,)	RECOMMENDATION
NDDOCR,)	
Respondents.)	

On February 25, 2009, Mitchell David Holbach filed a habeas corpus petition under 28 U.S.C. § 2254. (Doc. #2). In his petition, Holbach challenges a July 17, 2006, stalking conviction. He asserts four grounds for relief: (1) the North Dakota stalking law is unconstitutional on its face and as applied; (2) denial of his right to assistance of counsel; (3) failure of the prosecutor to disclose exculpatory evidence; and (4) “judicial and professional misconduct.”

The Court has received a Report and Recommendation from the Honorable Karen K. Klein, United States Magistrate Judge, pursuant to 28 U.S.C. § 636, denying Holbach’s motion for appointment of counsel and recommending that Holbach’s petition for habeas relief be dismissed with prejudice. (Doc. #7). Holbach objected to the Report and Recommendation. (Doc. #8). Holbach’s “objections” merely recast the grounds for relief asserted in his petition. Holbach does not dispute that he is no longer in custody for the 2006 conviction.¹ Because Holbach is no longer “in custody” for the 2006 conviction, this Court is without jurisdiction to address the merits of Holbach’s habeas petition. See Maleng v. Cook, 490 U.S. 488, 493 (1989)

¹ It appears Holbach was released from custody following the revocation of his probation relating to his July 2006 stalking conviction in March 2007. See State v. Holbach, 763 N.W.2d 761, 763 (N.D. 2009). Holbach was convicted again for stalking in 2008, which is why he is currently incarcerated.

(petitioner is not “in custody” for purposes of habeas relief once sentence imposed has fully expired, even if conviction can be used to enhance sentence for a subsequent crime); Charlton v. Morris, 53 F.3d 929, 929-30 (8th Cir. 1995) (per curiam) (same).

Thus, the Court has reviewed the Report and Recommendation, along with the entire file, and finds that the Magistrate Judge’s position is correct. Accordingly, the Court hereby adopts the Report and Recommendation in its entirety. For the reasons set forth therein, Holbach’s petition for habeas relief under 28 U.S.C. § 2254 is hereby **DISMISSED** with prejudice. Let judgment be entered accordingly.

IT IS SO ORDERED.

Dated this 15th day of May, 2009.

/s/ Ralph R. Erickson
Ralph R. Erickson, District Judge
United States District Court